~~FILED UNDER SEAL~~

IN THE SUPREME COURT OF THE UNITED STATES

No. 10A52

FARHI SAEED BIN MOHAMMED, APPLICANT

v.

BARACK OBAMA, ET AL.

OPPOSITION TO EMERGENCY APPLICATION FOR STAY

The Acting Solicitor General, on behalf of respondents Barack Obama et al., respectfully files this opposition to the emergency application for a stay of the court of appeals' mandate pending disposition of applicant's forthcoming petition for a writ of certiorari.

STATEMENT

Applicant Farhi Saeed Bin Mohammed (ISN 311) (applicant) is an Algerian citizen who has been detained at the Guantanamo Bay Naval Base. The United States has cleared him for transfer from Guantanamo Bay to his native Algeria. It is the longstanding policy of the United States that it will not transfer a detainee to a nation in which it is more likely than not that he will be

tortured. Here, the Department of State conducted an individualized analysis of applicant's circumstances and concluded that he may be returned to Algeria consistent with that policy.

Applicant sought an injunction barring his transfer, which the district court granted. The court of appeals summarily reversed that decision, holding that the district court's efforts to second-guess the government's determination regarding the appropriateness of transfer are squarely barred by this Court's decision in Munaf v. Geren, 128 S. Ct. 2207, 2226 (2008), and the court of appeals' decision in Kiyemba v. Obama, 561 F.3d 509 (D.C. Cir. 2009) (Kiyemba II), cert. denied, 130 S. Ct. 1880 (2010). The court of appeals then denied applicant's motion to stay its mandate. Applicant now seeks a stay from this Court.

1. Prior to a transfer of a Guantanamo Bay detainee, the Executive (typically through the Department of State) assesses issues concerning humane treatment of the detainee in the country of proposed transfer. Under the longstanding policy of the United States, no detainee will be transferred to a country if the State Department concludes that it is more likely than not that the detainee will face torture there. That policy was recognized by this Court in Munaf, see 128 S. Ct. at 2226, and has been reaffirmed by the government in several recent filings in this Court. See, e.g., Br. in Opp. at 4-5, Kiyemba v. Obama, No. 09-581 (citing numerous sworn declarations); Gov't Br. at 6-7, Kiyemba v.

Obama, No. 08-1234. In this case, the United States has provided sworn declarations stating its continued adherence to that important policy, as well as the State Department's specific determination that applicant may be returned to Algeria consistent with the policy. App., infra, 2a-3a, 11a-12a.

In Kiyemba II, the court of appeals held that where the Executive has provided sworn declarations explaining that it will not transfer a detainee to any country where it is more likely than not that he will face torture, "a detainee cannot prevail on the merits of a claim seeking to bar his transfer based upon the likelihood of his being tortured in the recipient country." 561 F.3d at 514. In reaching that conclusion, the court of appeals relied on Munaf, where this Court vacated an injunction barring the transfer to the Iraqi government for criminal prosecution of American citizens who were detained in Iraq by the United States military. 128 S. Ct. at 2220. The petitioners in Munaf sought an injunction prohibiting transfer because they alleged a fear of torture by the receiving government, id. at 2214-2215, 2225, but this Court rejected their claim, explaining that while torture "allegations are * * * a matter of serious concern, * * * that concern is to be addressed by the political branches, not the judiciary." Id. at 2225. Relying on Munaf, the Kiyemba II court held that where the government "has declared its policy not to transfer a detainee to a country" if torture would more likely than

not result, a "district court may not second-guess the Government's assessment of that likelihood." 561 F.3d at 516.

The court of appeals denied a petition for rehearing en banc in Kiyemba II, and this Court denied the petition for a writ of certiorari. See 130 S. Ct. 1880. One month later, another Guantanamo Bay detainee sought to challenge the court of appeals' precedential decision in Kiyemba II by filing a petition for initial hearing en banc. See Belbacha v. Obama, No. 08-5350 (D.C. Cir. Apr. 27, 2010). The court of appeals denied that petition, confirming that Kiyemba II is settled circuit precedent. See 08-5380 Order at 1 (D.C. Cir. June 3, 2010).

2. Applicant filed a petition for a writ of habeas corpus in federal district court, seeking to be released from Guantanamo Bay. In November 2009, the district court granted the petition and ordered the government to arrange applicant's release from Guantanamo Bay. Mohammed v. Obama, 689 F. Supp. 2d 38, 69 (D.D.C. 2009), appeal pending, No. 10-5034 (D.C. Cir.). The government has appealed that order, but the appeal is being held in abeyance based on the government's representations of its intent to repatriate applicant to his home country, which would moot the appeal.

Even prior to being granted habeas relief, however, applicant sought an injunction from the district court barring his transfer to Algeria. In consolidated proceedings on motions by a number of detainees for injunctions against transfer, the district court in

2008 enjoined applicant's transfer to Algeria pending a final decision in Kiyemba II. After this Court denied certiorari in Kiyemba II, the district court vacated that injunction [redacted] Applicant sought reconsideration of that decision, which was denied. Id. at A14-A22.

After his case was returned to his merits judge, applicant filed another motion seeking to bar his transfer from Guantanamo Bay to Algeria. See 05-1347 Emergency Motion for Injunction Against Transfer to Algeria (D.D.C. May 24, 2010). He asserted that, if he were returned to Algeria, he would face torture by "the security services," "armed Islamists," or "both" because he had been detained at Guantanamo Bay. Id. at 7. Applicant did not provide any specific allegations of past mistreatment in his motion, or any specific evidence regarding why he would be a target in Algeria. He also acknowledged that he has not lived in Algeria in over twenty years. Id. at 2. And applicant did not make any claim that he was entitled to be brought to the United States and released here, rather than returned to Algeria. Id. at 18 (seeking only an order "enjoining Respondents from transferring [applicant] to Algeria").

In response, the government submitted two sworn declarations from Ambassador Daniel Fried, Special Envoy for the Closure of the

Guantanamo Bay Detention Facility, reaffirming the longstanding policy of the United States not to transfer a Guantanamo Bay detainee to a country where it is more likely than not that he will be tortured. App., infra, 1a-8a, 9a-14a. [redacted]

The government contended that Munaf and Kiymeba II precluded the district court from second-guessing the Executive's determination that applicant may be transferred to Algeria consistent with its longstanding policy.

Rather than accept those assurances, the district court decided to itself assess whether transfer was appropriate. On June 3, 2010, the district court issued what it termed an "Administrative Stay" to prohibit the government from transferring applicant to Algeria. Appl. App. A25. One week later, the court entered an order directing Ambassador Fried to appear at a hearing on June 21, at which the court would "test[]" the government's "representations * * * that it has received assurances [of humane treatment] from the Algerian Government." Id. at A9. The court stated that it would conduct an "interrogation" of Ambassador

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[1] The reasons for submitting those classified declarations ex parte are detailed in those declarations. The declarations are being submitted to this Court ex parte concurrent with the filing of this opposition brief.

Fried until it was convinced that "there is real substance" to the Executive's determination. Ibid.

In light of Ambassador Fried's ongoing negotiations with other nations regarding the transfer of Guantanamo Bay detainees, which require him to maintain an active international travel schedule, the government asked the district court to immediately vacate the portion of its order requiring Ambassador Fried to appear in court. 05-1347 Emergency Motion for Reconsideration 7-8 (D.D.C. June 14, 2010). The government also requested that the district court reconsider its prohibition on applicant's transfer, reiterating that such relief is foreclosed by Munaf and Kiyemba II. Id. at 3-7. The district court agreed to postpone the June 21 hearing but declined to lift the injunction. See 05-1347 Order 2 (D.D.C. June 15, 2010).

3. The government sought summary reversal in the court of appeals, arguing that the district court's order directly contravened Munaf and Kiyemba II. After expedited briefing, the court of appeals invoked its authority under the All Writs Act, 28 U.S.C. 1651, and ordered the district court "to resolve all outstanding motions" on an expedited basis and "in a manner consistent with Munaf v. Geren, 553 U.S. 674 (2008), and Kiyemba v. Obama, 561 F.3d 509 (D.C. Cir. 2009)." Appl. App. A27. The court of appeals further instructed the district court to decide the motions "without requiring further testimony from Special Envoy

Fried or any other United States government official" and "in an order from which a party can take an immediate appeal." Ibid.

A few days later, the district court granted applicant's motion for a preliminary injunction and enjoined his transfer to Algeria. Appl. App. A29-A41. The court noted that the government had submitted three separate declarations from Ambassador Fried stating that the United States has concluded that applicant may be returned to Algeria consistent with the United States' longstanding policy. Id. at A32-A33. But the court decided that Ambassador Fried's sworn declarations were "inadequate," id. at A37, because the court's own "[d]etailed questioning could well uncover gaps in the representations made or the date relied upon," id. at A33. The court determined that it should be able to "test and probe" the government's transfer determination, by asking questions such as "[w]hat are the actual assurances, written or oral, that the United States Government is relying upon from Algeria," and "[h]ow can the United States enforce those diplomatic assurances from Algeria?" Id. at A34. And the court held that Munaf and Kiyemba II did not preclude that questioning because, in the court's view, those cases are limited to their particular facts. Id. at A35-A37.

Although it enjoined applicant's transfer to Algeria, the district court recognized the serious diplomatic consequences of its actions. In particular, the court expressly accepted the

government's sworn statements that an injunction could [redacted] and with other countries, and it assumed that "the Government will in fact suffer substantial harm if injunctive relief is granted." Appl. App. A40. But the district court nonetheless entered the requested injunction because it decided that the public interest would be "better served by ensuring that no errors are made" in transferring detainees from Guantanamo Bay, "even though there may well be some delays in reaching the very important goal of transferring detainees to appropriate countries." Ibid.

4. The government again immediately sought summary reversal from the court of appeals. After another round of expedited briefing, the court of appeals granted the summary reversal motion and dissolved the injunction barring applicant's transfer. Appl. App. A2-A5. The court of appeals found the case to be on all fours with Kiyemba II. Id. at A2. The court reaffirmed that under Kiyemba II and Munaf, "the district court may not prevent the transfer of a Guantanamo detainee when the government has determined that it is more likely than not that the detainee will not be tortured in the recipient country." Ibid. The court then stated that "the government's representations in this case satisfy that standard." Ibid. In particular, the court noted the government's representations "that it evaluated 'all information

that is in any way relevant to whether a detainee is more likely than not to be tortured in the receiving country'" -- "'including submissions [the government had] received to date from counsel representing the detainee'" -- and had "determined that * * * [applicant's] transfer complies with 'the policy that the U.S. Government will not transfer individuals to countries where it has determined that they are more likely than not to be tortured.'" Ibid. (quoting government declarations).

Judge Tatel concurred in part and dissented in part. Appl. App. A4-A5. Although he agreed that "the district court's injunction cannot stand to the extent that it rests on [applicant's] fear of torture from the Algerian government or on the court's desire to question Ambassador Fried about his declarations," he noted that applicant alleged torture at the hands of non-government actors, and he suggested that the case be remanded "to allow the government to submit supplemental declarations as to whether, in deciding it was safe to send [applicant] to Algeria, it considered potential threats caused by non-governmental entities." Id. at A5.

The court of appeals ordered that its mandate issue on July 14, 2010. Appl. App. A3. Applicant asked the court of appeals to stay its mandate for 90 days. After another round of expedited briefing, the court of appeals denied that motion. Id. at A7. Applicant now seeks a stay of the court of appeals' mandate from

this Court, pending the disposition of a forthcoming petition for a writ of certiorari.

ARGUMENT

To obtain a stay pending the filing and disposition of a petition for a writ of certiorari, an applicant must show (1) a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari; (2) a fair prospect that a majority of the Court will vote to reverse the judgment below; and (3) a likelihood that irreparable harm will result from the denial of a stay. Hollingsworth v. Perry, 130 S. Ct. 705, 709-710 (2010) (per curiam); accord Barnes v. E-Systems, Inc. Group Hosp. Med. & Surgical Ins. Plan, 501 U.S. 1301, 1302 (1991) (Scalia, J., in chambers); Stroup v. Willcox, 549 U.S. 1501 (Roberts, C.J., in chambers) (citing Barnes). "A stay is not a matter of right, even if irreparable injury might otherwise result." Indiana State Police Pension Trust v. Chrysler LLC, 129 S. Ct. 2275, 2276 (2009) (per curiam) (citation omitted). It is instead an exercise of judicial discretion, and the "party requesting a stay bears the burden of showing that the circumstances justify an exercise of that discretion." Ibid. (citation omitted).

A stay is not warranted here. Applicant's legal claims are foreclosed by this Court's decision in Munaf and the court of appeals' decision in Kiyemba II, which this Court declined to

review. Because the Court has already denied certiorari to review the D.C. Circuit precedent that controls this case, applicant has not established that a petition for a writ of certiorari would be granted on that same question in his case. The application for a stay therefore can properly be denied on that ground alone. And even if the Court were to grant certiorari notwithstanding its denial of certiorari in Kiyemba II only four months ago, it is unlikely this Court would reverse the judgment below, given the Court's decision in Munaf.

Moreover, any delay in issuance of the mandate would cause real and substantial harm to [redacted] the important goal of transferring detainees cleared for transfer and closing the Guantanamo Bay detention facility. As the government established and the district court assumed, an injunction barring applicant's release to Algeria [redacted] For these reasons,

the government has consistently sought -- and the court of appeals has consistently granted -- expedited review of applicant's request for injunctive relief. At the same time, the government has established through sworn declarations that applicant may be transferred to Algeria consistent with its longstanding humane-treatment policy. The balance of the harms therefore sharply favors denial of the application for a stay.

1. Applicant cannot demonstrate a reasonable probability that his petition for certiorari would be granted or a fair prospect that he would prevail on the merits. Applicant contends (Appl. 7) that his forthcoming certiorari petition will present three questions: whether the court of appeals properly applied Munaf in the context of transfers from Guantanamo Bay; whether the court of appeals' holding that courts may not second-guess the Executive's determination that transfer is appropriate is consistent with the Due Process Clause; and whether applicant is entitled to be released from Guantanamo Bay into the United States. The first two questions raise the same issue that this Court recently declined to review in Kiyemba II, and certiorari likely would be denied here for the same reasons. The third question is not presented in this case.

a. The fundamental issue applicant raises is the same question raised in Kiyemba II: whether a district court hearing a habeas corpus action may enjoin the Executive from releasing a

Guantanamo Bay detainee and sending him to a foreign country, when the Executive has submitted sworn declarations establishing that a detainee will not be sent to any country where he is more likely than not to be tortured. Pet. at i, Kiyemba v. Obama, No. 09-581. Because the Court has already denied certiorari on that issue, there is little prospect that the Court will grant certiorari or that applicant will prevail on the merits.

The court of appeals' decision in Kiyemba II is correct and follows from this Court's decision in Munaf. In Munaf, the Court vacated an injunction barring the transfer of American citizens detained in Iraq by the United States military to the Iraqi government for criminal prosecution. The petitioners in that case alleged that they feared torture in the receiving country and sought an injunction prohibiting their transfer. 128 S. Ct. at 2214-2215. This Court noted that the government had declared its commitment not to transfer the petitioners in circumstances in which torture was more likely than not to result and held that courts may not review the Executive's determination regarding the appropriateness of transfer in light of the petitioners' allegations. Id. at 2225-2226. The Court stated that such concerns about humane treatment are "to be addressed by the political branches, not the judiciary," because "the political branches are well situated to consider sensitive foreign policy issues, such as whether there is a serious prospect of torture at

the hands of an ally, and what to do about it if there is," while the judiciary is "not suited to second-guess such determinations" and such second-guessing "would require federal courts to pass judgment on foreign justice systems and undermine the Government's ability to speak with one voice in this area." Id. at 2226. The Court thus held that where the Executive Branch has made determinations about the appropriateness of transferring an individual based on "the Executive's assessment of the foreign country's legal system and * * * the Executive['s] * * * ability to obtain foreign assurances it considers reliable," those determinations are conclusive. Ibid. (citation omitted).

The court of appeals in Kiyemba II correctly held that the separation-of-powers analysis in Munaf "precludes the district court from barring the transfer of a Guantanamo detainee on the ground that he is likely to be tortured" where, as here, "[t]he Government has declared its policy" not to make such a transfer. 561 F.3d at 514, 516. The court explained that the Kiyemba II petitioners, like the petitioners in Munaf, were individuals in military detention who "asked the district court to enjoin their transfer because they feared they would be tortured in the recipient country." Id. at 514. The court noted that in Kiyemba II, as in Munaf, the government had declared its commitment not to transfer the petitioners in circumstances where torture was more likely than not to result. Id. at 514. Indeed, the court found

that "the present record shows" that "the Government does everything in its power to determine whether a particular country is likely to torture a particular detainee." Id. at 516. Accordingly, the Kiyemba II court held that "the district court may not question the Government's determination that a potential recipient country is not likely to torture a detainee." Id. at 514.

b. The court of appeals correctly determined that Munaf and Kiyemba II are controlling here. Applicant is an individual detained at Guantanamo Bay whose habeas corpus petition was granted. Like the petitioners in Munaf and Kiyemba II, he alleges a fear of torture in the proposed country of transfer and claims a habeas corpus right to litigate the appropriateness of transfer in federal district court. Appl. 17-23. Here, as in Munaf and Kiyemba II, the government has provided sworn declarations establishing that it will not transfer a detainee to a country where he is more likely than not to be tortured. See App., infra, 2a-3a, 11a-12a; Classified Decls. tabs A, B. The government also has submitted specific declarations describing the State Department's implementation of that policy with respect to proposed transfers to Algeria. See App., infra, 11a-13a. Accordingly, here, as in Munaf and Kiyemba II, the determination regarding the appropriateness of transfer is entrusted to the Executive Branch.

Nonetheless, the district court announced its intention to "test" the "representations of the United States Government that it has received assurances from the Algerian Government" about the humane treatment to be accorded transferred detainees. Appl. App. A9. The court proposed to do this by conducting an "interrogation" of Ambassador Fried, where it would ask about "the actual assurances, written or oral, that the United States Government is relying upon from Algeria," and how those diplomatic assurances would be enforced. Id. at A34. But those are precisely the matters that this Court said in Munaf must be addressed by the Executive, not the Judiciary. 128 S. Ct. at 2226. Accordingly, the court of appeals was correct to summarily reverse the district court's injunction.

c. Applicant's only responses (Appl. 18-21) are his attempts to distinguish Munaf on its facts and to revisit Kiyemba II based on an argument he has not preserved. Although the transfers of the individuals to the foreign government in Munaf arose in a different factual setting, Munaf's separation-of-powers analysis applies with full force to the transfer of detainees from Guantanamo Bay, because the detainees in both contexts raise the same claim, which is that they have a habeas corpus right to litigate in district court the appropriateness of transfer, despite an Executive determination that transfer is consistent with the government's humane-treatment policy.

Applicant's claim (Appl. 20) that he fears attacks by private parties if returned to Algeria provides no basis to depart from Munaf's separation-of-powers analysis. These are the sorts of concerns that should "be addressed by the political branches, not the judiciary," Munaf, 128 S. Ct. at 2226, and as described below, the government would take seriously credible presentations of significant and current concerns. See pp. 23-24, infra. But applicant has not made such a presentation to the Executive. And a district court order barring transfer based upon alleged potential harms from private parties would be inconsistent with Munaf, because such an order would require examining sensitive diplomatic negotiations and second-guessing the Executive's transfer determination. See Munaf, 128 S. Ct. at 2225 ("[I]t is for the political branches, not the judiciary, to assess practices in foreign countries and to determine national policy in light of those assessments.").

More generally, there is no legally enforceable rule under which the district court could enjoin the Executive from repatriating an individual based upon claims relating to the actions of private parties, especially where such alleged actions are unrelated to any government action. Although the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), does not apply as a source of law in these Guantanamo habeas proceedings, see 8 U.S.C. 1252(a)(4); Foreign

Affairs Reform and Restructuring Act of 1998, Pub. L. No. 105-277, § 2242(d), 112 Stat. 2681 (allowing for judicial review under article 3 of the CAT only in certain immigration proceedings), even if it did, it would not provide a basis for relief here. Article 3 prohibits State Parties from expelling, returning, or extraditing individuals to any country where it is more likely than not that they would be tortured, and the definition of torture in Article 1 requires the involvement or acquiescence of a public official. CAT, Arts. 1, 3(1). Accordingly, Article 3 of the CAT does not encompass claims based upon the actions of private parties, with no allegation of any governmental involvement.

Regarding Kiyemba II, applicant's argument before the district court and the court of appeals was that that case is distinguishable on its facts. See 10-5200 Opp. to Summ. Rev. Motion 10-14; 10-5218 Opp. to Summ. Rev. Motion 11-12. He now raises a different claim, which is that he has a procedural due process right to challenge his transfer in court and a substantive due process right to obtain an injunction barring transfer if "he establishes that he reasonably fears that he will be tortured by the receiving government or non-governmental actors." Appl. 20. That argument was not raised in the court of appeals or the district court, and this Court therefore should decline to consider it. See, e.g., NCAA v. Smith, 525 U.S. 459, 470 (1999).

In any event, in Munaf, a case that involved United States citizen detainees with full due process rights, this Court held that the courts may not second-guess a determination by the Executive that a detainee is not likely to be tortured in the proposed country of transfer. 128 S. Ct. at 2225-2226. The Court explained that "[e]ven with respect to claims that detainees would be denied constitutional rights if transferred, we have recognized that it is for the political branches, not the judiciary, to assess practices in foreign countries and to determine national policy in light of those assessments." Id. at 2225; see also Holmes v. Laird, 459 F.2d 1211, 1225 (D.C. Cir. 1972) (where United States citizen service members sued to prevent transfer to another country, the transfer presented "a matter beyond the purview of this court").

The certiorari petition in Kiyemba II also raised the due process argument, asking the Court to consider whether the court of appeals' application of Munaf violated the procedural and substantive due process rights of Guantanamo Bay detainees. See Pet. at 18-22, Kiyemba v. Obama, No. 09-581. This Court denied certiorari. See 130 S. Ct. 1880. Accordingly, there is no reasonable prospect that this Court would grant certiorari or that applicant would prevail on the merits of his Kiyemba II-related claims.

d. There is likewise little prospect that this Court would grant review of applicant's third claim, or that he would prevail on the merits of that claim. Applicant contends that his certiorari petition will raise the question whether a successful Guantanamo Bay habeas petitioner who "ha[s] a reasonable fear that he will be subject to torture or other mistreatment [if] transferred to a particular country" has a habeas corpus or due process right to "be released into the United States if the Government is unwilling or unable to arrange for his resettlement in a country where he does not have a reasonable fear of such mistreatment." Appl. 21. That question was not presented to or passed upon by the courts below, and it has therefore been waived. This Court should not consider it in the first instance.

Below, the only relief applicant sought was an order "enjoining [the government] from transferring [him] to Algeria." 05-1347 Emergency Motion for Injunction Against Transfer to Algeria 18. That is precisely the relief that the district court granted. Appl. App. A40-A41, A43. Applicant made no effort to establish below that he is entitled to release into the United States because there is no country to which he can be safely transferred. Neither the district court nor the court of appeals ruled on such an argument. See id. at A1-A5 (court of appeals opinion), A29-A41 (district court opinion).

Applicant's response (Appl. 21 n.12) is that this Court should consider the issue because it was "fully briefed" in a different case, Kiyemba v. Obama, 555 F.3d 1022 (D.C. Cir.) (Kiyemba I), cert. granted, 130 S. Ct. 458 (2009), vacated and remanded, 130 S. Ct. 1235 (2010), reinstated as amended, 605 F.3d 1046 (D.C. Cir. 2010) (per curiam). But applicant has made no showing that he is similarly situated to the Uighur detainees whose situation was at issue in Kiyemba I.[2] Accordingly, there is no prospect that the Court will grant certiorari and agree on the merits of applicant's claim of entitlement to release in the United States.

2. Applicant has failed to establish that he faces a likelihood of irreparable harm if the judgment of the court of appeals is not stayed. The United States takes allegations of torture seriously. In the numerous sworn declarations submitted in this case, the government has reaffirmed its longstanding humane-treatment policy. The declarations also describe how the United States has applied that policy in applicant's case and state the United States' determination that applicant may be returned to Algeria consistent with that policy. The declarations confirm that

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[2] Contrary to applicant's contention (Appl. 21 n.12), he did not raise any argument about release into the United States in his oppositions to the government's motions for summary reversal. His only argument arguably based on Kiyemba I was a brief contention -- not addressed by the courts below -- that he "should not be transferred anywhere without his consent, at least if his decision to withhold consent has a reasonable basis." 10-5200 Opp. to Summ. Rev. Motion 12 (D.C. Cir. June 22, 2010); see 10-5218 Opp. to Summ. Rev. Motion 15 (D.C. Cir. July 6, 2010) (making similar argument).

the Executive Branch has engaged in extensive negotiations and made searching inquiries before determining that it is not more likely than not that applicant will face torture if he is repatriated to Algeria.

That the government's stated policy focuses on treatment by the receiving government does not mean that the government ignores or excludes from consideration the likelihood of serious mistreatment by non-state actors in assessing the appropriateness of transfer. In fact, the State Department considers information from a variety of sources, including that received from counsel representing the detainee, when it determines whether resettlement or repatriation can be effectuated consistently with United States' post-transfer humane treatment policy. App., infra, 11a-12a. Notably, Ambassador Fried's declaration considered, as a relevant factor, whether there were any allegations of serious mistreatment in connection with past transfers, ibid., and the fact that ten detainees have been repatriated from Guantanamo to Algeria without any credible allegations brought to the United States' attention of injury or mistreatment, see id. at 11a; [redacted]

Here, however, applicant raised no credible allegations of harm from non-government actors that warranted further consideration. In his initial injunction motion, applicant alleged only generalized fears of mistreatment in Algeria by "the security

services" and "armed Islamists," and he did not make any specific allegations of past mistreatment. The sole document in the record that applicant has alleged supports his claim of harm from private parties is a declaration in which applicant describes how his car was stolen by armed men, one of whom he recognized, over twenty years ago. See 10-5200 Addendum to Opp. to Summ. Rev. Motion A83 (D.C. Cir. June 22, 2010). Applicant contends that the carjacking had a nexus to a terrorist group because one of the carjackers told him to "leave the car for the sake of God." Ibid. Nothing in the declaration or in any other portion of the record suggests that the carjacker was an "armed Islamist" or was making a religious threat.

If applicant had credibly presented significant and current concerns in a manner that could be substantiated, the government would have taken these concerns seriously. In fact, the government has in other cases determined that a detainee would not be repatriated for reasons that included concerns regarding serious mistreatment by non-state actors. But under the circumstances here, applicant's generalized assertions do not establish a likelihood of irreparable injury if his stay application is denied.

3. At the same time, granting the application for a stay pending certiorari would harm the Executive and the public interest. As a general matter, the transfer of detainees from Guantanamo Bay requires significant negotiation with and cooperation of other sovereign governments, and judicial second-

guessing of those negotiations and transfer decisions likely would undermine the United States' ability to obtain cooperation of other nations in transferring detainees and closing the Guantanamo Bay detention facility.

In this case, [redacted] the district court assumed, that delay of applicant's release to Algeria would cause substantial harm to the United States. Appl. App. A39-A40. And as the district court recognized, [redacted] See also Crosby v. National Foreign Trade Council, 530 U.S. 363, 381 (2000) (noting the importance of "the capacity of the President to speak for the Nation with one voice in dealing with other governments"). Moreover, the district court found that delay would interfere with the "enormous public interest * * * in determining the fate of the many detainees left at Guantanamo Bay," and "the importance of accomplishing it as quickly as possible." Id. at A40. For these important reasons, the government has consistently sought and received expedited review regarding applicant's injunction motion.

[redacted] --

[redacted] The balance of interests therefore weighs decidedly against the issuance of a stay.

CONCLUSION

The motion for a stay of the court of appeals' mandate should be denied.

Respectfully submitted.

EDWIN S. KNEEDLER
Acting Solicitor General
Counsel of Record

JULY 2010

APPENDIX

DECLARATION OF DANIEL FRIED

I, Daniel Fried, pursuant to 28 U.S.C. § 1746, hereby declare and say as follows:

1. I have been the Special Envoy for the Closure of the Guantanamo Bay Detention Facility since accepting my appointment on May 15, 2009. In my capacity as Special Envoy, I engage in diplomatic dialogue with foreign governments concerning the repatriation and/or resettlement of individuals who are detained at the U.S. detention facility at Guantanamo Bay, Cuba. My position was established in order to intensify diplomatic efforts to arrange for the repatriation or resettlement of individuals approved for such disposition under the review procedures established by Executive Order 13,492, which was signed by President Obama on January 22, 2009. Prior to accepting these appointments, I was the Department of State's Assistant Secretary for European and Eurasian Affairs from May 2005-May 2009 and the Special Assistant to the President and National Security Council (NSC) Senior Director for European and Eurasian Affairs from January 2001-May 2005. I also served as Ambassador to Poland from 1997-2000 and, starting in 1977 when I entered the Foreign Service, in various positions at the State Department, at overseas posts, and at the NSC.

2. On January 22, 2009, the President of the United States signed Executive Order 13,492, which ordered that the detention facilities at Guantanamo shall be closed as soon as practicable, and no later than one year from the date of the order. As a result, the Guantanamo Review Task Force was created in order to determine whether the individuals held in the detention facility at Guantanamo should be returned to their home country, released, transferred to a third country, or transferred to another U.S. detention facility in a manner consistent with law and the national security and foreign policy interests of the United States. To that end, the

Executive Order commands "a prompt and thorough review of the factual and legal bases for the continued detention of all individuals currently held at [Guantanamo Bay]" to determine whether each detainee can be transferred or released, prosecuted for criminal conduct, or provided another lawful disposition consistent with "the national security and foreign policy interests of the United States and the interests of justice." *Id.* at §§ 2(d).

3. As Special Envoy, my primary task is to implement the mission set forth in Executive Order 13,492 of finding dispositions for individuals who are approved for repatriation or resettlement in a manner that is consistent with the national security and foreign policy interests of the United States, and that will allow the U.S. government to achieve the closure of the Guantanamo Bay Detention Facility as soon as practicable. In this task, I am guided by the U.S. government's policies with respect to post-transfer security and post-transfer humane treatment, including the policy that the U.S. government will not transfer individuals to countries where it has determined that they are more likely than not to be tortured. In light of these policies, there are certain individuals who have been (or will be) approved for transfer out of U.S. custody but who the U.S. Government determines cannot be safely and/or responsibly returned to their home countries.

4. Of particular concern to the Department of State is the question of whether the foreign government concerned will treat the detainee humanely, in a manner consistent with its international obligations, and will not persecute the individual on the basis of his race, religion, nationality, membership in a social group, or political opinion. The Department is particularly mindful of the longstanding policy of the United States not to transfer a person to a country if it determines that it is more likely than not that the person will be tortured or, in appropriate cases,

that the person has a well-founded fear of persecution and would not be disqualified from persecution protection on criminal- or security-related grounds. This policy is consistent with the approach taken by the United States in implementing the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment and the Protocol Relating to the Status of Refugees. The Department of State works closely with relevant agencies to advise on the likelihood of persecution or torture in a given country and the adequacy and credibility of assurances obtained from a particular foreign government prior to any transfer.

5. The Department of State generally has responsibility for communications on transfer-related matters between the United States and foreign governments. The Department of State receives requests from foreign governments for the transfer of detainees and forwards such requests to the Guantanamo Review Task Force and the Department of Defense for coordination with appropriate Departments and agencies of the United States Government. The Department of State also conveys requests from the United States to foreign governments to accept the transfer of their nationals. In cases where approved detainees cannot be transferred to their countries of nationality because of humane treatment concerns, the Department of State communicates with foreign governments to explore third-country resettlement possibilities. Numerous countries have been approached to date with respect to various detainees who fall within this category, and the U.S. Government has had success in resettling in third countries detainees with no prior legal ties to that location (including Albania, Belgium, Bermuda, France, Ireland, Palau, and Portugal).

6. Once a detainee has been approved for transfer through the processes of the Guantanamo Review Task Force, my office generally takes the lead in discussions with the

foreign government concerned or, where repatriation is not an available option because of humane treatment concerns or for other reasons, with third country governments where resettlement might be appropriate. The primary purpose of these discussions is to learn what measures the receiving government is likely to take to ensure that the detainee will not pose a continuing threat to the United States or its allies, including resettlement arrangements, and to obtain appropriate transfer assurances. My office seeks assurances that the United States Government considers necessary and appropriate for the country in question. Among the assurances sought in every transfer case in which security measures or (in fewer cases, detention) by the government concerned are foreseen or possible is the assurance of humane treatment and treatment in accordance with the international obligations of the foreign government accepting transfer. The Department of State considers whether the State in question is party to the relevant treaties, such as the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and ensures that assurances are tailored accordingly if the State concerned is not a party or other circumstances warrant.

7. Decisions with respect to disposition of Guantanamo detainees are made on a case-by-case basis, taking into account the particular circumstances of the transfer, the receiving country, the individual concerned, and any concerns regarding torture or persecution either extant or that may arise. Recommendations by the Department of State are decided at senior levels through a process involving Department officials most familiar with international legal standards and obligations and the conditions in the countries concerned. Within the Department of State, my office, together with the Office of the Legal Adviser, the Bureau of Democracy, Human Rights, and Labor, and the relevant regional bureau, normally evaluate foreign

government assurances in light of the circumstances of the individual concerned and the overall record of the country in question with respect to human rights and other relevant issues. The views of the Bureau of Democracy, Human Rights, and Labor, which drafts the U.S. Government's annual Human Rights Reports,[1] and of the relevant regional bureau, country desk, or U.S. Embassy are important in evaluating foreign government assurances and any individual fear of persecution or torture claims, because they are knowledgeable about matters such as human rights, prison conditions, and prisoners' access to counsel both in general and as they may apply to a particular case in the foreign country concerned, and knowledgeable as well as to particular information about the entity or individual that is offering the assurance in any particular case and as to relevant background about any allegations of mistreatment that may have surfaced in connection with past transfers to the country in question. If deemed appropriate, my office and other relevant offices brief the Secretary or other Department Principals before finalizing the position of the Department of State.

8. The essential question in evaluating foreign government assurances relating to humane treatment is whether, taking into account these assurances and the totality of other relevant factors relating to the individual and the government in question, the competent Department of State officials believe it is more likely than not that the individual will be tortured in the country to which he is being transferred. In determining whether it is "more likely than not" that an individual would be tortured, the United States takes into account the treatment the individual is likely to receive upon transfer, including, *inter alia,* the expressed commitments of officials

[1] The Human Rights Reports are the official State Department reports to Congress on human rights conditions in individual countries for a given year as mandated by law (sections 116(d) and 502(b) of the Foreign Assistance Act of 1961, as amended, and section 505(c) of the Trade Act of 1974, as amended).

from the foreign government accepting transfer. When evaluating the adequacy of any assurances, Department officials consider the identity, position, or other information concerning the official relaying the assurances, and political or legal developments in the foreign country concerned that would provide context (and credibility) for the assurances provided. Department officials may also consider U.S. diplomatic relations with the country concerned when evaluating assurances. For instance, Department officials may make a judgment regarding foreign government's incentives and capacities to fulfill its assurances to the United States, including the importance to the government concerned of maintaining good relations and cooperation with the United States. In an appropriate case, the Department of State may also consider seeking the foreign government's assurance of access by governmental or non-governmental entities in the country concerned to monitor the condition of an individual returned to that country, or of U.S. Government access to the individual for such purposes. In instances in which the United States transfers an individual subject to assurances, it would pursue any credible report and take appropriate action if it had reason to believe that those assurances would not be, or had not been, honored. We take seriously past practices by governments. In an instance in which specific concerns about the treatment an individual may receive cannot be resolved satisfactorily, we have in the past and would in the future recommend against transfer, consistent with the United States policy.

9. The Department of State's ability to seek and obtain assurances from a foreign government depends in part on the Department's ability to treat its dealings with the foreign government with discretion. This is especially the case with respect to issues having to do with detainees at the Guantanamo Bay Detention Facility. Consistent with the diplomatic sensitivities

that surround the Department's communications with foreign governments concerning allegations relating to torture, the Department of State does not unilaterally make public the specific assurances or other precautionary measures obtained in order to avoid the chilling effects of making such discussions public and the possible damage to our ability to conduct foreign relations. Seeking assurances may be seen as raising questions about the requesting State's institutions or commitment to the rule of law, even in cases where the assurances are sought to highlight the issue for the country concerned and satisfy the Department that the country is aware of the concerns raised and is in a position to undertake a commitment of humane treatment of a particular individual. There also may be circumstances where it may be important to protect sources of information (such as sources within a foreign government) about a government's willingness or capability to abide by assurances concerning humane treatment or relevant international obligations.

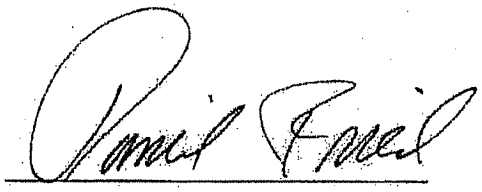
10. If the Department were required to disclose outside appropriate Executive branch channels its communications with a foreign government relating to particular mistreatment or torture concerns, that government, as well as other governments, would likely be reluctant in the future to communicate frankly with the United States concerning such issues. I know from experience that the delicate diplomatic exchange that is often required in these sensitive contexts cannot occur effectively except in a confidential setting. Later review in a public forum of the Department's dealings with a particular foreign government regarding Guantanamo detainee transfer matters would seriously undermine our ability to investigate allegations of mistreatment or torture that come to our attention and to reach acceptable accommodations with other governments to address those important concerns.

11. The Department's recommendation concerning transfer relies heavily on the facts and analyses provided by various offices within the Department, including its Embassies. Confidentiality is often essential to ensure that the advice and analysis provided by these offices are useful and informative for the decision-maker. If those offices are expected to provide candid and useful assessments, they normally need to know that their reports will not later be publicly disclosed or brought to the attention of officials and others in the foreign States with which they deal on a regular basis. Such disclosure could chill important sources of information and could interfere with the ability of our foreign relations personnel to interact effectively with foreign State officials.

12. The Executive Branch, and in particular the Department of State, has the tools to obtain and evaluate assurances of humane treatment, to make recommendations about whether transfers can be made consistent with U.S. government policy on humane treatment, and where appropriate to follow up with receiving governments on compliance with those assurances. The Department of State has used these tools in the past to facilitate transfers in a responsible manner that comports with the policies described herein. Judicial review of the diplomatic dialogue between the U.S. Government and other governments concerning the terms of transfer, or of the ultimate decision to effect a transfer to a given country, risks undermining the ability of the U.S Government to speak with one voice on Guantanamo transfer issues. This is critical as we continue to seek to reduce the number of detainees in the Guantanamo detention facility and move toward the day when the facility can be closed altogether.

I declare under the penalty of perjury that the foregoing is true and correct.

Executed on November 25, 2009.



Daniel Fried

DECLARATION OF DANIEL FRIED

I, Daniel Fried, pursuant to 28 U.S.C. § 1746, hereby declare and say as follows:

1. I have been the Special Envoy for the Closure of the Guantanamo Bay Detention Facility since accepting my appointment on May 15, 2009. In my capacity as Special Envoy, I engage in diplomatic dialogue with foreign governments concerning the repatriation and/or resettlement of individuals who are detained at the U.S. detention facility at Guantanamo Bay, Cuba. My position was established in order to intensify diplomatic efforts to arrange for the repatriation or resettlement of individuals approved for such disposition under the review procedures established by Executive Order 13,492, which was signed by President Obama on January 22, 2009. Prior to accepting this appointment, I was the Department of State's Assistant Secretary for European and Eurasian Affairs from May, 2005-May, 2009 and the Special Assistant to the President and NSC Senior Director for European and Eurasian Affairs from January, 2001-May-2005. I also served as Ambassador to Poland from 1997-2000 and prior to that in various posts at the State Department, at overseas posts, and at the NSC starting in 1977. This declaration is submitted in support of the Government's motion to vacate the injunctions barring the Government from repatriating [redacted] Algerian nationals – [redacted] Fathi Saeed bin Mohammed (ISN 311); Abdul Aziz Naji (ISN 744) -- to Algeria. For the reasons discussed below, the injunction in this case places an inappropriate obstacle in the way of U.S. Government diplomatic efforts aimed at transferring these detainees to their country of nationality.

2. As Special Envoy, my primary task is to implement the mission set forth in Executive Order 13,492 of finding dispositions for individuals who are approved for repatriation or

resettlement in a manner that is consistent with the national security and foreign policy interests of the United States, and that will allow the U.S. Government to achieve the closure of the Guantanamo Bay Detention Facility as soon as practicable and in any event not later than January 22, 2010. In this task I am guided by the U.S. Government's policies with respect to post-transfer security and post-transfer humane treatment, including the policy that the U.S. Government will not transfer individuals to countries where it has determined that they are more likely than not to be tortured.

3. Through the application of these policies, the Department of State has assessed, on the basis of available information and in accordance with the procedures set forth in the attached declaration of Ambassador Clint Williamson,[1] that the [redacted] Algerian detainees referenced above can be repatriated to their country of nationality consistent with our policies on post-transfer humane treatment. In making this determination, the Department of State has taken into account that the United States Government has, from July 2008 to the present, transferred eight detainees to the exclusive custody and control of the Government of Algeria and we have received no credible allegations to suggest that the Government of Algeria has treated any of these individuals in a manner inconsistent with its obligations under the Convention Against Torture and other Cruel, Inhuman, or Degrading Treatment or Punishment (which includes prohibitions on torture and other forms of cruel, inhuman or degrading or treatment or punishment). We are not aware of any information that would lead the Department of State to conclude that the

[1] Although Ambassador Williamson's office is no longer the office handling issues related to the transfer of Guantanamo Bay detainees within the State Department, the policies and practices set forth in his declaration remain in effect.

Government of Algeria will deviate from this track record in its treatment of the [redacted] detainees referenced above. Decisions with respect to transfer of Guantanamo Bay detainees are made on an individual case-by-case basis, taking into account a variety of information and sources regarding the particular circumstances of the transfer, the country, the individual concerned, and any concerns regarding torture or persecution that may arise. *See* Williamson Decl. ¶ 7-8. In the cases of the [redacted] Algerian nationals at issue here, we have considered a variety of information, including submissions we have received to date from counsel representing the detainees, to reach our present conclusion that the detainees can be repatriated to Algeria consistent with our policies on post-transfer humane treatment.

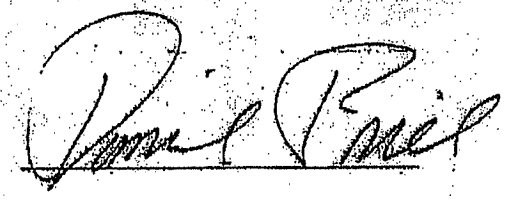
4. Executive Order 13,492 requires the closure of the Guantanamo Bay detention facility no later than January 22, 2010. The implementation of this order is an important foreign policy objective of the United States Government. In order to give effect to this order it is critical that the Department of State be in a position to negotiate for the repatriation of detainees who have been approved for transfer and can be returned to their home countries consistent with the United States Government's security and post-transfer humane treatment policies.

5. [redacted]

6. As explained above and in the attached declaration of Ambassador Williamson, the U.S. Government will not transfer individuals to countries where it has determined that they are more likely than not to be tortured. The Department of State has, and will continue, to apply this policy in its dealings with the Government of Algeria. In the event additional information comes to light that leads the Department of State to reconsider its current conclusion that the [redacted] Algerian nationals can be repatriated to Algeria consistent with this policy, then the repatriation will not occur, notwithstanding the consequences to our diplomatic relationship with Algeria, until such concerns are addressed.

I declare under the penalty of perjury that the foregoing is true and correct.

Executed on July 9, 2009.



Daniel Fried